No. 85-1353

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A & P TEA COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT A & P TEA COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals properly exercise its appellate review authority to affirm summary judgment in favor of Defendant A & P on a ground different from that relied on by the District Court?

2. Whether the Court of Appeals properly applied the Title VII *prima facie* case standard as enunciated by this Court in *McDonnell Douglas v. Green* and its progeny.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties identified in the Petition for Writ of Certiorari, Paula Brockhouse was an additional petitioner in the consolidated proceedings before the United States Court of Appeals for the Seventh Circuit (Nos. 84-1732 and 84-1733).

STATEMENT REQUIRED BY RULE 28.1

The Great Atlantic & Pacific Tea Company, Inc. has no parent company, subsidiaries (other than wholly owned subsidiaries), or affiliates. Tengelmann-Warenhandelsgesellschaft, a partnership organized under the laws of West Germany and controlled by Mr. Erivan Haub, owns beneficially and of record approximately 52.7% of the outstanding shares of the Company's common stock.

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BRIEF OF RESPONDENT A & P TEA COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent opposes the Petition for a Writ of Certiorari because this case does not merit review by this Court. The issues presented are not controlled by *Celotex Corp. v. Catrett*, No. 85-198, for two reasons. Unlike in *Celotex*, the defendant in this case relied upon evidence to support its summary judgment motion. Further, the issue herein is whether an appellate court, looking at a record as a whole, may affirm a judgment on independent grounds, whereas the central issue in *Celotex* is the district court's discretion in allocating burdens of proof in summary judgment proceedings. The Court of Appeals decision does not create a conflict among the circuits on that issue. Moreover, the decision below is entirely consistent with long-standing legal principles on the elements of a Title VII *prima facie* case established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny.

COUNTERSTATEMENT OF THE CASE

Petitioner filed this Title VII lawsuit in 1979, claiming race and sex discrimination in her employment as a retail clerk in certain grocery stores within the Chicago Division of A & P Tea Company ("A & P"). A & P filed a summary judgment motion[1] seeking dismissal of Petitioner's sex discrimination claims after several years of discovery in the case. In discovery, the parties had examined documents from the administrative proceedings on Petitioner's underlying discrimination charges, and A & P had responded to interrogatories, voluminous requests for production of documents, and requests to admit. In addition, lengthy depositions were taken of Petitioner and A & P's Chicago Division Industrial Relations Manager.

In support of its motion for summary judgment, A & P presented affirmative evidence from Petitioner's deposition, her underlying EEOC charges, and related documents to show that under Petitioner's own version of the facts, accepted as true for purposes of the motion, she could not establish a Title VII violation. App. J at 9-13. The initial thrust of A & P's argument was that Petitioner had not even properly perfected her claim, because her underlying EEOC charge was limited to a race claim. When Petitioner responded with an affidavit in which she insisted that, in fact, she did check the "sex" box in the EEOC charge, A & P then argued that summary judgment on the sex claim must still be granted because all vacancies in the job she claimed she was discriminatorily denied — bookkeeper — were filled exclusively by females.

At that point, although not revealed in Petitioner's Statement of the Case herein, she was granted leave to file a sur-

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[1] A & P's motion also challenged the sex discrimination claims of Paula Brockhouse, a second plaintiff who had also brought claims of sex discrimination in a consolidated case. Although Brockhouse's claims also were dismissed on summary judgment and that judgment also was affirmed by the Court of Appeals below, Petitioner seeks review in this Court only as to her own individual claims.

reply brief, attached hereto as Respondent's Appendix. An expressed purpose of the sur-reply was to address A & P's showing that Petitioner had failed "to allege even a *prima facie* case of sex discrimination." Resp. App. at 1-2. It relied, in turn, on her previous affidavit, which indicated she had expressed a general interest in training for positions other than bookkeeper, including assistant manager jobs.[2]

The Petition herein acknowledges that in discovery Petitioner had learned of twenty-seven assistant manager positions that had been filled in A & P's Chicago Division between 1975 and 1978. Rather than identify which, if any, of these positions she was allegedly discriminatorily denied, Petitioner stated in her affidavit only that she had sought training for some position other than bookkeeper, so she could "advance, for instance, into the assistant manager position." She further argued she "had already met" the Company's no *prima facie* case argument in previous briefing on this and other motions. Resp. App. at 2. Moreover, she argued, "a finding that [she had] applied for positions other than head bookkeeper [was] not essential to her case," because "even if [she] could not point to a specific position for which a man was preferred, her relegation to a limited employment path in which she was not given a chance to compete with men [was] clearly discriminatory." Resp. App. at 4. Finally, she stated, Petitioner "need not fit her sex discrimination case into the rigid formula described by . . . A & P to state a *prima facie* case and survive a motion for summary judgment." Resp. App. at 4.

Because the district court's ruling on the summary judgment motion did not address Petitioner's alleged desire for assistant manager positions, Petitioner attempted to highlight this issue in her appeal to the Seventh Circuit. Her briefs to the

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[2] As the court below noted, Petitioner had never specifically identified in her deposition any assistant manager positions in which she was interested or which she had been denied. App. A at 8.

Court of Appeals reiterated the arguments from her district court sur-reply memorandum. Appellants' Br. at 15-18; Appellants' Reply Br. at 7-14.

The Seventh Circuit said she was wrong and held that Petitioner had failed to establish a *prima facie* case of discrimination in promotions, either to bookkeeper or to assistant manager positions. It affirmed the judgment on that basis. It found that Petitioner, as part of her *prima facie* case, was required simply to identify which specific positions she claimed were discriminatorily denied her. In recognition that A & P had not used a formal application or job posting system, the court below did not hold Petitioner to a showing of which positions she actually *had* applied for. Instead, it determined that a mere showing of the positions she "would have applied for" would be sufficient to establish a *prima facie* case in the particular factual setting here. App. A at 7-8. However, since Petitioner had failed to make even this minimal showing after four years of discovery, and none of the evidence she relied upon "suggests anything more than a vague interest in the assistant manager position," the Court of Appeals affirmed the judgment of the district court. App.A at 8.[3]

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[3] At all times material to Petitioner's claim, A & P's Chicago Division encompassed over 200 stores in three states. R. 15 at 2-3. Petitioner herself lived and worked in Kankakee and later Rockford, Illinois, approximately 90 miles from the Chicago metropolitan area where most of the stores (and presumably most of the vacancies) were located. R. 15 at 2-3; R. 168 (Box Dep.) at 6, 12, 14. Thus, specific identification of the position was critical both to the application of the *McDonnell Douglas* burden of proof formula and to the court's ability to "assess the proof in order to see whether there is a genuine need for a trial." Fed. R. Civ. P. 56, Advisory Committee note on the 1963 amendments to Rule 56(e). *See* pp. 8-13, *infra*.

ARGUMENT

I. THE *CELOTEX* DECISION IS NOT APPLICABLE TO THIS CASE AND WILL NOT CONTROL ITS DISPOSITION.

A. A & P's Motion for Summary Judgment Was Supported by Affirmative Evidence.

The *Celotex*[4] decision will not control this case. The central legal issue in *Celotex* is whether the moving party on a summary judgment motion can obtain summary judgment without making *any* affirmative evidentiary showing to support the motion. This case does not present the same question, because here A & P did exactly what the movant in *Celotex* did not do: it filed its motion after extensive discovery and supported the motion with evidence that Petitioner could not, as a matter of law, satisfy all the elements of a *prima facie* case of sex discrimination under Title VII.

More particularly, A & P cited Petitioner's own version of her claim, as stated in her EEOC charge and accompanying documents (App. J at 9-13) that she was discriminatorily denied bookkeeper positions (App. J at 12-15), along with other evidence in the record that all such positions had been filled by women. Thus, no sex case could be sustained. Petitioner fully understood the issue. Indeed, her sur-reply was for the express purpose of rebutting A & P's showing that she had failed "to allege even a *prima facie* case of sex discrimination." Apparently conceding that her sex discrimination claim could not be sustained with respect to the bookkeeper claim, Petitioner contended in her sur-reply that she was also making a claim that she was denied assistant manager posi-

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[4] *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985), *cert. granted sub nom., Celotex Corp. v. Catrett*, ___U.S. ___, 106 S. Ct. 342 (1985) hereinafter "*Celotex*").

tions. In turn, she cited evidence in the discovery record to support that contention. Ultimately, the Court of Appeals determined that this evidence was not sufficient, as a matter of law, to make out a *prima facie* case.

The summary judgment proceeding in this case involved the most appropriate and commonplace use of Rule 56. After extensive discovery, Defendant moved to test the legal sufficiency of Petitioner's claims based on evidence of Petitioner's own version of her claim. Petitioner responded in kind with other evidence from the discovery record.

Accordingly, this case is completely different from *Celotex* where, because the defendant made only boilerplate allegations in its motion for summary judgment, the non-moving party plaintiff was put to the entire burden of shaping the issues and evidence for summary judgment purposes.[5] Here Petitioner was saddled with no such burden and had full notice of the evidence and arguments on which A & P was relying.[6] In short, Petitioner's strained attempt to argue that *Celotex* controls this case is without merit.[7]

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[5] Interestingly, the dissenting judge in the court below did not find that the majority was wrong because of the type of deficiency cited in *Celotex*. On the contrary, the dissent here was fully satisfied that the issue was clear below and that the record was sufficiently developed. The sole basis for his dissent was that he felt the facts showed a *prima facie* case. App. A at 14.

[6] Moreover, unlike here, the defendant in *Celotex* had not received in discovery the plaintiff's version of the case upon which to rely and, in effect, was arguably using Rule 56 improperly as a discovery device. *Celotex*, 765 F.2d at 185 n. 12. This is not the issue here.

[7] For a Seventh Circuit case that does address the *Celotex* issue, *see American Nurses' Association v. State of Illinois*, ___ F.2d ___, 40 Fair Empl. Prac. Cas. (BNA) 244 (7th Cir. 1986).

B. Petitioner's Real Complaint, That The Court of Appeals Affirmed On A Ground Not Relied Upon By The District Court, Does Not Merit Review.

It is apparent that what the Petitioner is most concerned about is not the issue in *Celotex*, but that the Court of Appeals relied upon a ground not relied on by the district court. This underscores another distinction from the *Celotex* case. *Celotex* concerns the discretion accorded a district court judge to allocate burdens of proof in a summary judgment proceeding under Fed. R. Civ. P. 56. *Celotex*, 756 F.2d at 186, 187 (agreement of majority and dissent on this point). Here, in contrast, the Court of Appeals invoked appellate review principles which allowed it to affirm on another ground supported by the record. This, in turn, served an important interest in preserving the finality of the judgment. This sound but unremarkable exercise of its appellate review authority certainly does not merit this Court's attention in this case.

A court of appeals may affirm a judgment on any ground supported by the record, even if that ground was not relied on or even considered by the district court. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). It does not matter that the district court's judgment was based on erroneous grounds. *Id.* The only limitation is that the party aggrieved by the judgment must have had an opportunity below to present evidence on the issue, and to have argued it either in the lower court or on appeal. *Arlinghaus v. Ritenour*, 622 F.2d 629, 638-39 (2d Cir.), *cert. denied*, 448 U.S. 1013 (1980); *Rich v. United States Lines, Inc.*, 596 F.2d 541, 551 (3d Cir. 1979); *Paskaly v. Seale*, 506 F.2d 1209, 1211 n.4 (9th Cir. 1974). *See also Charbonnages de France v. Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979).

This case fits squarely within those principles. As Petitioner's sur-reply memorandum shows, she was fully aware that the

issue was whether her version of the facts was sufficient, as a matter of law, to establish a *prima facie* case. The contention in the Petition that she had no notice of the issue on which evidence was demanded of her (Pet. for Cert. at 11) is disingenuous. The only surprise to which she was subjected was that the Court of Appeals did not adopt her view of the proper legal standard for establishing a Title VII *prima facie* case.[8]

Thus, notwithstanding Petitioner's strained effort to present this case as a Rule 56 due process matter, in fact the Petition seeks nothing more than a reassessment of whether the Court of Appeals properly applied the law to the facts. That is not an issue which warrants review by this Court.

II. THE TITLE VII *PRIMA FACIE* CASE STANDARD APPLIED BY THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

At the time A & P's summary judgment motion was filed, Petitioner's case was simply an individual claim presenting the single question whether *Petitioner* had been discriminated

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[8] Given Petitioner's express acknowledgement of the *prima facie* case issue, the cases cited at pages 14-15 of the Petition are inapposite. Each of those cases reached the courts of appeals in a procedural posture in which no discovery on the disputed issue had been taken in the lower court, or in which there had been no prior opportunity for argument. Moreover, because the Petitioner litigated the assistant manager question in the district court to her own full satisfaction (as evidenced by her sur-reply), she cannot properly be heard to complain at this time about decisions made on an incomplete evidentiary record. *See* Pet. for Cert. at 13. Finally, Petitioner's expressed fear about burdening district courts with extraneous matters in summary judgment proceedings is gratuitous, since the grounds relied on by the Court of Appeals here all clearly were in issue — at Petitioner's instigation — in the district court. *See* Pet. for Cert. at 14.

against in obtaining promotions because of her sex.[9] In consequence, the evidentiary standards applied by the Court of Appeals properly were those appropriate to an individual Title VII claim, and as such were entirely consistent with the decisions of this Court and the other courts of appeals that have addressed the same issue.

Petitioner's attack on the *prima facie* case standard applied by the Court of Appeals is based on the fundamentally faulty premise that this was a " 'pattern and practice' case," in the nature of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). *See* Pet. for Cert. at 18 n.9. That same premise led Petitioner in her sur-reply memorandum, and throughout this case, to argue that broad statistics and general statements would suffice to support a *prima facie* case, while evidence showing some actual injury to her was unnecessary.

This Court first defined the elements of a Title VII *prima facie* case of discrimination in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973). Identification of a specific vacancy, *i.e.,* the job that a plaintiff applied and was qualified for, is a fundamental element of the *McDonnell Douglas prima facie* case. 411 U.S. at 802. Because the purpose of such a showing is to create an inference of discrimination, *McDonnell Douglas* further recognizes that the necessary elements of a *prima facie* case may have to be adapted to fit different factual situations. 411 U.S. at 802 n.13. *See also Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253-54 n.6 (1981).

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[9] Although Petitioner's Complaint originally sought to represent a class of other women, the Company filed the instant summary judgment motion before any class certification issues had been ruled upon, and the district court ultimately refused to certify any class of females in the case. The summary judgment motion itself only challenged Petitioner's ability to sustain her individual claim of discrimination, and that was the sole issue before the Court of Appeals.

The Court of Appeals' "would have applied" formulation was a simple adaptation of the *McDonnell Douglas* standards to fit an employment setting where no formal application process was utilized for filling positions, but where vacancies may have occurred in any of hundreds of stores, most of which were in Chicago, ninety miles from Petitioner's home and work locations. App. A. at 7. The obvious purpose was to permit a determination whether Petitioner's failure to obtain any assistant manager job was because of her sex, or was for some other nondiscriminatory reason.[10]

This Court noted in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), that the *McDonnell Douglas* formula "demand[s] that the alleged discriminatee demonstrate at least that [her] rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute *or relative lack of qualifications* or the absence of a vacancy in the job sought." 431 U.S. at 358 n.44 (emphasis added). In the present case, it would be impossible to compare Petitioner's qualifications with those of the employees who were selected, without some identification of the specific positions in question.[11] Such comparisons are particularly significant when the opening involves a

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[10] Petitioner repeatedly suggests that the "would have applied" standard is an onerous and burdensome requirement. Petitioner contends, for example, that it requires her to "explain why she did not apply for openings" and to "prove," as part of her *prima facie* case, that she would have applied for specific positions. *See* Pet. for Cert. at 16, 20 n.10. This overstates the Seventh Circuit's holding to an unjustifiable degree: the decision required a simple identification. Moreover, in the district court Petitioner did not even assert that an identification of the positions she would have applied for was difficult or impossible, but only that it was unnecessary.

[11] As noted, here Petitioner never identified the timing or location of *any* of the twenty-seven positions potentially in issue, much less the ones she would have applied for.

managerial position, as was the case here. *See Mason v. Continental Ill. Nat. Bank,* 704 F.2d 361, 365 (7th Cir. 1983); *Christensen v. Equitable Life Assur. Society,* 767 F.2d 340, 343 (7th Cir. 1985), *cert. denied,* ___ U.S. ___, 106 S. Ct. 885 (1986). *See also Elliott v. Group Medical and Surgical Service,* 714 F.2d 556, 567 (5th Cir. 1983). Petitioner offers no reason why this type of comparison is any less necessary in her case than in all other Title VII promotion cases.

Without an identification of the specific positions Petitioner would have applied for, it also was impossible to determine her genuine interest in, and/or availability for, such positions. In *Teamsters,* this Court was unwilling to assume that all "deterred applicants" for line-driver jobs actually wanted those positions, even though line-driver jobs paid higher wages; each individual claimant therefore was required to prove an actual interest in the job. 431 U.S. at 369-70. It similarly cannot be presumed that Petitioner in this case would have been interested in all (or any of the) twenty-seven assistant manager positions.[12] As in *Teamsters,* showing merely that such positions

[12] The record in this case underscores the fallacy of such a presumption. Petitioner transferred from Kankakee to Rockford, Illinois in 1977 because she had recently married, and her husband lived in Rockford. R. 168 (Box Dep.) at 13. In early 1978, Petitioner had actually *requested a demotion* from assistant bookkeeper to cashier, because her husband was ill. R. 168 (Box Dep.) at 15. In light of these career decisions, one cannot *reasonably infer* that Petitioner would have sought any promotion that would have required her to move from her family. Indeed, when her store in Rockford closed, Petitioner declined an offer of a transfer to a job in Belvedere, Illinois (only twenty miles away), in part because it was too far from her home. R. 168 (Box Dep.) at 16-17. If Petitioner was unwilling to travel twenty miles when the choice was between continued employment or termination, it is unreasonable to assume that she would have transferred to another position in the Chicago metropolitan area.

existed shows nothing about whether Petitioner was denied any of them because of her sex.[13]

Petitioner misreads the decisions of the Fourth, Eighth, Ninth and Eleventh Circuits when she contends that they are in conflict with the decision of the Seventh Circuit below. They simply hold that in an employment setting where an employer fills positions without a formal application or job posting system, a Title VII plaintiff is relieved of the obligation to establish, as an element of his *prima facie* case, that he applied for a desired position *before the fact;* instead, other evidence of his interest in the position is sufficient.

Unlike the present case, each of the plaintiffs in those cases already had identified the specific vacancies they allegedly had been denied. Thus, the decisions cited by Petitioner did not adopt a "would have applied" standard for identifying vacancies simply because they never even had to reach the issue. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 758 (9th Cir. 1980) (Director of Investment Relations); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132 (11th Cir. 1984) (City Sales job); *Holsey v. Armour & Co.*, 743 F.2d 199, 208

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[13] Under long-standing principles, even the evidence Petitioner relied on below — simple statistics showing the number of positions filled and vague anecdotal testimony — was insufficient to support a *prima facie* case. Her statistical sample of twenty-seven vacancies over a four-year period in some two hundred stores is too small in its own right to have any statistical significance. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974). *Accord Soria v. Ozinga Brothers, Inc.*, 704 F.2d 990, 994-97 (7th Cir. 1983). Moreover, this Court long has recognized that statistics on the treatment of others "may not in and of themselves be controlling as to an individualized . . . decision particularly in the presence of an otherwise justifiable reason for [the decision]." *McDonnell Douglas v. Green*, 411 U.S. 792, 805 n.19 (1973). Thus, the actual decision in question must be examined. Obviously, that cannot be done until the decision has been identified. Consistent with *McDonnell Douglas*, the Court of Appeals' standard is a straightforward vehicle for making such an identification.

(4th Cir. 1984), *cert. denied,* ____U.S.____, 105 S. Ct. 1395 (1985) (foreman vacancy and sales position); *Easley v. Empire, Inc.,* 757 F.2d 923, 925 (8th Cir. 1985) (retail manager position); *Paxton v. Union National Bank,* 688 F.2d 552, 568 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983) (lead control clerk). Thus, far from holding it unnecessary for a Title VII plaintiff to identify the actual vacancies which she might have sought, the Fourth, Eighth, Ninth and Eleventh Circuit decisions are consistent with the Court of Appeals' decision herein in recognizing that the *prima* facie case principles of *McDonnell Douglas* can only be applied after plaintiffs have identified vacancies which they desired and for which they were qualified.

Indeed, in deciding a related hiring issue in *Carmichael,* the Eleventh Circuit took an even stronger position than the Court of Appeals below. Consistent with *McDonnell Douglas,* it expressly rejected the plaintiff's contention that statistical evidence showing classwide discrimination was sufficient to make out a *prima facie* case in an individual case. To the contrary, the plaintiff was required to show that he was the victim of an identifiable act of discrimination by showing a specific job he had been denied. 738 F.2d at 1131-132.

For the foregoing reasons, the Seventh Circuit's "would have applied" formulation is a proper application of the *McDonnell Douglas* standards for a *prima facie* case and creates no conflict among the circuits requiring resolution by this Court.

CONCLUSION

In this case, A & P filed a summary judgment motion at the most appropriate and typical juncture of a law suit — after an evidentiary record had been built through discovery. In response, Petitioner elected to rely on limited, and in the circumstances meaningless, numerical data concerning assistant manager vacancies, without ever identifying the specifics of such vacancies, much less which vacancies she allegedly desired. Because neither the trial court nor the appellate court found her argument persuasive, she now seeks to bootstrap her claims to another summary judgment case in which this Court has granted *certiorari* to consider a question of law which has no application to the instant case.

Just because this Court has granted *certiorari* in one summary judgment case does not mean that every summary judgment case can or should be reviewed by this Court. Given the commonplace nature of the summary judgment proceedings here, if *certiorari* is granted in this case, there are hundreds, if not thousands, of summary judgment cases which this Court must consider. Unlike *Celotex*, this case was briefed and argued in the conventional manner, and the court below applied legal standards that were both correct and suitable to the facts of the case.

The Petition neither raises vital questions of federal law nor does it involve conflicting decisions among the courts of appeals. Accordingly, and for all the foregoing reasons herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

VARNADO CHAFFEE, et al., *Plaintiffs,* *vs.* A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 2735
WILLIE J. WEST, et al., *Plaintiffs,* *vs.* A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 3625
WILLIAM R. WEST, *Plaintiff,* *vs.* THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Defendant.*	No. 79 C 4332
JoANN FORD BOX, et al., *Plaintiffs,* *vs.* A & P TEA COMPANY, *Defendant.*	No. 79 C 4359 Judge Joel M. Flaum

PLAINTIFFS' SUR-REPLY MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT ON THE SEX DISCRIMINATION CLAIM OF JoANN FORD BOX

As plaintiffs understand it, defendant A & P's argument for summary judgment on the sex discrimination claim of JoAnn

Ford Box is that: (1) The only job to which Box ever sought a promotion was that of head book-keeper; (2) all the head book-keeper positions which she knew of and for which she sought a promotion were filled by women; and (3) hence Box never lost to a man in head-on competition for a promotion and therefore has failed to allege even a *prima facie* case of sex discrimination.

Plaintiffs believed that they had already met this argument in briefing on the outstanding Motion for Class Certification and Motions for Summary Judgment. But the issue may have been lost in the variety of arguments presented to the Court.

The facts are these. A & P's personnel system operates without standards, without a formal bidding process, and without a formal application process. Employees do not compete head-to-head for promotions in a formalized system. Rather, employees are hand-picked for promotion by their supervisors—and promoted employees may be transferred to different stores or new districts to fill these positions. Thus, employees compete with a wide range of other A & P employees in the Chicago Division for a variety of possible positions, many of which they may never know are available. See Defendant's Answers to Plaintiffs' Interrogatories Nos. 3(b), 3(c), 4(f), 9(d) and 9(h); Deposition of John Rogers pp. 166-168, 176-184, 187-189; Paula Brockhouse, pp. 5, 10, 34, 40.

Within this subjective system, plaintiffs allege that women are virtually locked into the clerk-bookkeeper employment path. The facts supporting this conclusion are fully described in plaintiffs' briefs on class certification and in opposition to defendant's Motions for Summary Judgment.

Plaintiff JoAnn Box is a black woman. Her claims relate directly to the employment practices above-described. As a black person, Ms. Box found herself at a disadvantage in competing with white women for jobs in the narrow promotion

path usually held by women. She expected that A & P would consider her for a book-keeper position—that, after all, was the position traditionally filled by women—and found to her dismay that she always lost to whites. Thus, as defendants point out, her EEOC charges and other documents refer in large part to the preference given to white women in competition for the book-keeper position.

But defendant A & P misstates the facts when it suggests that Box limited her promotion requests to the book-keeper position. As she clearly states in paragraph 5 of her Affidavit (attached to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment) when Box found out that she would not receive book-keeper training, she asked for training for some other position, such as assistant manager. She was told that it was the Company's position to usually promote women only to the book-keeper position.[1]

Thus A & P's argument is mistaken for the following reasons: (1) Box did not limit herself to application for promotion to the book-keeper position. She asked to be trained for promotion to other positions and received neither training nor a promotion; (2) Box did not lose only in competition with white women, limited to her store and limited to the book-keeper position. Given A & P's subjective personnel system and its practice of moving promoted employees between stores, Box lost in competition throughout the Chicago Division for jobs filled traditionally by men; (3) Box was subject to a pattern of discriminatory behavior that does not fit the model of head-on competition that A & P imagines existed. Rather, she was relegated to a system in which, for the most part, women were not even given a chance to compete with men.

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[1] In a hand-written note to her EEOC charge (Exhibit A, attached to plaintiffs earlier Memorandum) Box stated that she had been passed over for promotion to the Assistant Manager position.

In any event, a finding that Ms. Box applied for positions other than head book-keeper is not essential to her case. In a subjective system in which employees are hand-picked for promotion, Box need not show that she made a formal application to complain of discriminatory decision-making. *Simon* v. *Honeywell, Inc.*, 27 FEP Cases 73, 74 n. 3 (5th Cir. 1981). And even if Box could not point to a specific position for which a man was preferred, her relegation to a limited employment path in which she was not given a chance to compete with men is clearly discriminatory. *Willis* v. *Chicago Extruded Metals Corp.*, 375 F.Supp. 362 (N.D. Ill. 1974); *Hardy* v. *Porter*, 26 FEP Cases 1260 (5th Cir. 1980). She need not fit her sex discrimination case into the rigid formula described by defendant A & P to state a *prima facie* case and survive a motion for summary judgment. *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914, 920-921 (2d Cir. 1981); *McCorstin* v. *United States Steel Corp.*, 621 F.2d 749, 752-755 (5th Cir. 1980).

Defendant's argument is simply wrong. There are a series of undetermined questions of fact involved in Box's claim of sex discrimination. In these circumstances summary judgment should not be granted. *Abraham* v. *Graphic Arts Int'l. Union*, 660 F.2d 811 (D.C. Cir. 1981).

Respectfully submitted,

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